BORA LASKIN LAW LIBRARY
3 1761 10083914 1

COMMERCIAL AND CONSUMER TRANSACTIONS

CASEBOOK

JACOB S. ZIEGEL

1976-77

YORK
UNIVERSITY

OSGOODE HALL LAW SCHOOL

Store
KF
888
Z5
1976

CASES AND MATERIALS ON

COMMERCIAL AND CONSUMER TRANSACTIONS

LAW

edited by

JACOB S. ZIEGEL
Professor of Law
University of Toronto

SIXTH EDITION

For student use only
Not for commercial sale

For use in 1976-7
academic year

KF
F28
25
1976

Table of Contents

Preface xvi

Table of Abbreviations xvii

Concordance of Sale of Goods Acts xix

Page No.

I. THE EVOLUTION OF MODERN SALES AND CONSUMER LAW

Historical Note 1
Honnold, "American Experience under Article 2" 9
Bank of England v. Vagliano Bros. 19
Note on Codification 21
Extract, "The Future of Canadian Consumerism" 23
Neilson, "Overview of Ontario Consumer Protection Legislation", LSUC Conference Paper 30

II. THE CONCEPT OF SALE

Introductory Note 52

A. The Requirement for Money

Robshaw Bros. Ltd. v. Mayer 53

B. Lease or Sale, The Form and Substance Problem

Lee v. Butler 57
Helby v. Matthews 59
Note on Hire-Purchase and Equipment Leasing 63
Interpretation Bulletin IT-233 66

C. Contracts for Work and Materials

Robinson v. Graves 67
Note on U.S. Cases 71
Young & Marten Ltd. v. McManus Childs Ltd. 72
Note 75

Page No.

D. Consignment Agreements, or "Sale or Return"

Weiner v. Harris 77
Restatement 2d, Agency, vol.I, ch.14. 81
Langley v. Kahnert 82

III. FORMATION OF THE CONTRACT

Introductory Note 87

A. Early Judicially Developed Defenses: *Non Est Factum*, Misrepresentation, and Other Techniques

Gallie v. Lee 91
Note on *Non Est Factum* 99
United Dominion Trust v. Western *102a*
Commercial Acceptance Corp. Ltd. v. Paris 103
W.W. Distributors & Co. v. Thorsteinson 110
Note on Cooling Off Legislation and Unsolicited Goods 112
Gaertner v. Fiesta Dance Studies Ltd. Et Al. 115
Note on Long Term Contracts and Right of Cancellation 118
Trans-Canada Credit Corp. Ltd. v. Zaluski 119
Re Jackson and *Beaudry* 122
Note on Direct Selling and Pyramid Schemes 128

B. A Generalized Judicial Doctrine of Unconscionability

Lloyds Bank Ltd. v. Bundy 130
Clifford Davis Ltd. v. W.E.A. Records 135

C. Legislative Developments

Note on the New Consumer Sales Practices Legislation 139
Newspaper Clipping 141
Hanson, Director of Trade Practices v. John's Tax Services Ltd. 143
Director of Trade Practices v. Household Finance Corp. of Canada 147

IV. PRICE

Introductory Note 156
Extract "Recent Legislative and Judicial Trends in Consumer Credit in Canada". 158
Note on Cost of Credit 163

Page No.

A.G. Ontario v. Barfried Enterprises Ltd. 166
Morehouse v. Income Investments Ltd. 173
Note on UTRA 183
Note on Unit Pricing 184
Note on CIA s.36 186
R. v. Colgate-Palmolive Ltd. 187
Note on s.36 Cases 190

V. CHARACTERIZATION OF EXPRESS REPRESENTATIONS AND THEIR EFFECTS

(a) Private Law Aspects

Boulton, The Making of Business Contracts 193
Leaf v. International Galleries 197
Esso Petroleum v. Mardon 203
Oscar Chess Ltd. v. Williams 208
Cehave N.V. v. Bremer M.B.H. 213
Quaker Oats Co. of Canada v. Kitzul 220
Boulton, The Making of Business Contracts 223
Cochran v. McDonald 225
Shanklin Pier Ltd. v. Detel Products Ltd. 227
Randy Knitwear Inc. v. American Cyanimid Co. 230
Problems 234
Magazine Clipping 235
Note on Parol Evidence Rule 236

(b) Public Law Aspects

Introductory Note 237
Advertisement 241
D.C.C.A. Statistics on Consumer Complaints 242
R. v. Imperial Tobacco Products Ltd. 244
Note on the Credulous Man Test 255
Charles of the Ritz Corp. v. F.T.C. 256
Steinberg's Ltd. v. The Queen 257
Tesco Ltd. v. Nattrass 267
Note on Vicarious Liability and Due Diligence .. 274

VI. THE SELLER'S CONTRACTUAL OBLIGATIONS

1. Title

Niblett v. Confectioners' Materials Co. 275

Page No.

Rowland v. Divall 278
Note 281
Sloan v. Empire Motors Ltd. and Vancouver Finance Co. Ltd. 283
Karflex Ltd. v. Poole 287
Warman v. Southern Counties Car Financing Co. 293
Butterworth v. Kingsway Motors 298
Mason v. Burningham 305
Problems 308

2. Time, Delivery and Quantity

a. Time of Delivery

Hartley v. Hymans 309
Allen v. Danforth Motors Ltd. 311
Chas. Rickards Ltd. v. Oppenheim 314
Boulton, The Making of Business Contracts .. 320

b. Place of Delivery

Beaver Specialty Ltd. v. Donald H. Bain Ltd. 328

c. Quantity

Wilensko v. Fenwick & Co. Ltd. 339
Braithwaite v. Foreign Hardwood Co. 343
Scythes & Co. v. Dods Knitting Co. 346

3. The Seller's Obligation with Respect to Description, Merchantability, Fitness and Sample.

O.L.R.C. Report on Consumer Warranties and Guarantees 349

(1) The Implied Condition of Description

Varley v. Whipp 352
Beale v. Taylor 354
"Updating Automobiles". 356
Consumer Contact 357
Corven N. Sams v. East-way Foodliner Co. ... 358

Page No.

Ashington Piggeries Ltd. v. Christopher Hill Ltd. 360
Note on *Ashington Piggeries* 376
Andrew Brothers Ltd. v. Singer & Co. Ltd. . 377
Arcos Ltd. v. E.A. Ronaasen and Son 381

(2) The Implied Condition of Merchantability

(a) The Meaning of the Term

Henry Kendall & Sons v. Wm. Lillico & Sons. 384
B.S. Brown & Son v. Craiks 401
International Business Machines v. Shcherban 405
Note on Perfect Tender Rule 409

(b) Second-Hand Goods

Bartlett v. Sydney Marcus Ltd. 411
Crowther v. Shannon Motor Co. 413

(c) Motor Vehicles

The Problem of Used Vehicles 415
Statistics on Dealer Practices 417
Highway Traffic Act, s.58 (Ont.) 420
Safety Standards Certificate 422
Presley v. MacDonald 423
Questions 427
Motor Vehicle Safety Act (Can.), Extracts 428
What Has Been Done To Date: A Critical Voice 430
Newspaper Clipping 437

(d) Public Controls of Dangerous Drugs

History of Food & Drug Legislation in Canada 438
Food & Drugs Act, (Can.), Extracts ... 442
Time Magazine, Extract 443
Hazardous Products Act (Can.), Extracts 444
Note on Hazardous Products Legislation 447
Newspaper Clippings 448

(e) Allergies

Ingham v. Emes 451

Page No.

(f) Perishable Goods

Mash & Murrell Ltd. v. Joseph I. Emanuel Ltd. 453
Note on Durability 459
CMA Reaction to OLRC Warranties Report 460

(g) Compliance with Law of Place of Delivery

Sumner Permain & Co. v. Webb & Co. ... 464

(h) Examination Under S.15.2

Thornett & Fehr v. Beers & Son 466

(3) The Implied Condition of Fitness

Baldry v. Marshall 469
Note 472
Henry Kendall & Sons v. Wm. Lillico & Sons. 474
Ashington Piggeries Ltd. v. Christopher Hill Ltd. 360

(4) The Implied Condition in a Sale by Sample

Mody v. Gregson 476

VII. THE BUYER'S REMEDIES FOR BREACH OF THE SELLER'S OBLIGATIONS

Introductory Note 483

1. The Right to Reject and Statutory Limitations Thereon

(a) By Virtue of s.12(1) and s.19 Rule 1:

Home Gas Ltd. v. Streeter 486
Varley v. Whipp, supra 352
Note 489

(b) By Virtue of ss.34, 35

Hardy & Co. v. Hillerns and Fowler..... 490
Rafuse Motors Ltd. v. Mardo Construction .. 494
Notes on Rescission 497
Hart-Park Company v. Jones 499

Page No.

(c) Part Rejection and Part Acceptance of Indivisible Contracts

Wm. Barker (Junior) and Co. Ltd. v. Ed. T. Agius Ltd. 504

(d) Installment Contracts

Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd..... 506

2. The Measure of Damages

Koufos v. C. Czarnikow 510
Note 518
Cullinane v. British "Rema" Mfg. Co. Ltd. 519
Street, Principles of the Law of Damages 526
Sunnyside Greenhouses Ltd. v. Golden West Seeds Ltd. 527
Note on Computation of Damages 535
R.G. McLean Ltd. v. Canadian Vickers Ltd. 536
Note on Impecuniosity 543
Freedhoff v. Pomalift Industries 545

3. Specific Performance

In Re Wait 549
Sky Petroleum Ltd. v. VIP Petroleum Ltd. 553
Cohen v. Roche 554

VIII. CONTRACTUAL AND OTHER LIMITATIONS ON THE BUYER'S RIGHTS AND REMEDIES

Introductory Note 555

1. Disclaimer Clauses

(a) Recent Judicial Developments

Suisse Atlantique v. N.V. Rotterdamschen .. 557
R.G. McLean Ltd. v. Canadian Vickers Ltd., supra 536
Note 565
Harbutt's Plasticene v. Wayne Tank Co. Ltd. 566

Page No.

Wathes v. Austin 571
Henningsen v. Bloomfield Motors 572

(b) Legislative Provisions

Note 581

2. Cut-Off Clauses and Promissory Notes: The Buyer-Financer Relationship

Extract from "Consumer Credit in Canada"..... 582
Note 584

A. The Commercial Position

Killoran v. Monticello State Bank 584
Federal Discount Corp. v. St. Pierre 590
Note on *Federal Discount* 597
Range v. Belvedere Finance Corp. 598
Note on *Range* 601
Industrial Acceptance Corp. v. Richard 602

B. Part V, Bills of Exchange Act

Canadian Imperial Bank of Commerce v. Lively 605
Note on Legislative Reforms in Canada and the U.S. 613
Bank of Nova Scotia v. Archo Industries Ltd. 616
Rosenthal, "Negotiability -- Who Needs It?" 617

3. Practical Restrictions on The Buyer's Ability to Litigate

Marsden-Smedley, "Is the Legal System any Use to Consumers?" 618
Osgoode Hall: News Release 625

Consumer Class Actions

Newsweek, Excerpt 630
Rule 75, Rules of Practice, S.C.O. 631
William, "Consumer Class Actions in Canada -- Some Proposals for Reform" 631
Markt & Co. v. Knight Steamship Ltd. 633
Note on Class Actions in Canada 651
Farnham v. Fingold 652

	Page No.
Naken v. General Motors of Canada Ltd. ...	654
Vasquez v. Superior Court of San Joaquin County	661
Rule 23, Federal Rules of Civil Procedure (U.S.)	672
Eisen v. Carlisle & Jacquelin	674
Eisen III, Extract on Fluid Class Recovery	683
Newspaper Notice	684
Canadian Tire Corp. Ltd. v. Desmond	687
Newspaper Clipping	689

IX. THE BUYER'S CLAIM AGAINST THE MANUFACTURER: THE PRIVITY PROBLEM

1. Obligations Imposed by Law: Canadian and U.S. Developments

OLRC Report on Consumer Warranties, Extract	670
Henningsen v. Bloomfield Motors, Inc. Extract No.2	700
Santor v. A & M Karagheusian, Inc.	701
Seely v. White Motor Co.	706
Note on Subsequent Developments	715

2. The Problem of Horizontal Privity

OLRC Report on Consumer Warranties, Extract	718
Henningsen v. Bloomfield Motors, Inc., Extract No.3	720
Note on Recent Developments	721

3. Manufacturer's Express Warranties

Henningsen v. Bloomfield Motor's Inc., Extract No.4	722
Note	723
Comparative Table of Auto Warranties, 1971	724
American Motors 1971 New Car Warranty	726
The Romero Study	727
CAMA Documents	729
Westinghouse Dryer Warranty	732
Tru-Guard Warranty and Correspondence	733
Magnuson-Moss Warranty - Federal Trade Commission Improvement Act	736

Page No.

X. THE PASSING OF PROPERTY BETWEEN SELLER AND BUYER

s.19, r.1 *Jerome v. Clements Motor Sales Ltd.* 745
s.19, r.4 Consignment or 'Sale or Return', *supra*, Ch.*II* 77
s.19, r.5 *Carlos Federspiel & Co. v. Chas. Twigg & Co.* 751
Caradoc Nurseries v. Marsh 755
Note 757

XI. THE TRANSFER (OR RETENTION) OF TITLE AND THE POSITION OF THIRD PARTIES: EXCEPTIONS TO THE "NEMO DAT" RULE

Introductory Note 759

1. Seller in Possession

Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd. 760
Worcester Works Finance Ltd. v. Cooden Engineering Co. Ltd. 766
Note on Bills of Sale Legislation 771

2. Buyer in Possession

Central Newbury Car Auctions v. Unity Finance Ltd. 772
Notes 780
Traders Finance Corp. v. Dawson Implements Ltd.. 782
Century Credit Corp. v. Richard 785
Note on Extra-Provincial Conditional Sales and Conflict of Laws 789
Newtons of Wembley Ltd. v. Williams 790
Kozak v. Ford Motor Credit Co. of Canada Ltd. and J & D's Used Cars Ltd. 795
Note on *Brandon v. Leckie* 803

3. Inventory Financing and the Buyer in Ordinary Course

Traders Group Ltd. v. Gouthro 804
Note 811
Lloyds and Scottish Finance Ltd. v. Williams ... 812

Page No.

4. Towards a More Rationalized Approach

Extract, Law Reform Committee (U.K.), 12th Report 816

5. The Bulk Sales Act ..... [statutory volume]

XII. AN INTRODUCTION TO THE PERSONAL PROPERTY SECURITY ACT

Canadian Chattel Security Law: Past Experience and Current Developments 819
Selected Bibliography 863
Sample Problems 886

XIII. THE BUYER'S OBLIGATIONS AND THE SELLER'S RIGHTS AND REMEDIES -- CASH SALES

Introductory Note 869
Colley v. Overseas Exporters Ltd. 871
R. V. Ward v. Bignall 878
Charter v. Sullivan 886
Stocklosers v. Johnson 891
Note 903
Law Commission (U.K.), Working Paper on Penalty Clauses and Money Paid 903

XIV. CREDIT TRANSACTIONS: CONSUMER CREDIT

1. General Background

Introductory Note 905
Consumer Credit: Outstanding Balances of Selected Holders 907
Neufeld, "The Economic Significance of Consumer Credit" and Commentary by W.P. Mors 908
Fortin, "The Social Meaning and Implications of Consumer Credit" 924
Ziegel, "The Regulation of Consumer Credit" 930
Note 940

Page No.

2. The Cashless Society - Herein of Credit Cards, Credit Reporting, and Billing Problems

Extract, FRS Report on Consumer Credit 942
Note on Canadian Developments 944
Newspaper Clippings 946

Legal Problems of Credit Cards:

(a) Note 956

(b) Chargex Agreements 957

(c) 1970 Amendments to CCPA 959

(d) Note on Canadian Developments 959

(e) Fair Credit Billing Act, 1974 960

(f) Newspaper Clippings 966

(g) Report Accompanying FCRA 967

(h) Note on Canadian Developments 972

XV. RIGHTS AND REMEDIES OF THE CONDITIONAL SELLER

A. General Position

Introductory Note 974

1. Action for Price

Sawyer v. Pringle 975
Note on Deficiency Claims 980
Trans-Canada Corp. v. Foubert 981
T. Eaton Co. Canada v. Schick 984

2. Repossessory Rights

Financings Ltd. v. Baldock 992
Note on Equipment Leases, Hire-Purchase and Conditional Sales 999
R. v. Doucette 1000
Note on the Right to Repossess 1005

Page No.

3. Action for Price after Repossession

McNutt v. Alexander Fraser Ltd. 1006

4. Acceleration Clauses and Rights of Reinstatement

Protector Loan Co. v. Grice 1009
Note 1013
Peresluka v. General Motors Acceptance Corp. of Canada Ltd. 1014
Note 1017

5. Deficiency Claims

Humphrey Motors Ltd. v. Ells 1017
Sawyer v. Pringle, supra 975
General Securities Ltd. v. Lyons 1022
Note on PPSA Position 1025
C.A.C. v. Fisher 1026
Note on PPSA position 1035
Note on Deficiency Rights 1036
Canadian Imperial Bank of Commerce v. Materi 1037

6. Damage Claims for Lessee's Breach of Contracts

Yeoman Credit Ltd. v. Waragowski *1047*
C.A.C. v. Regent Park Butcher Shop Ltd. ... *1049*
Note 1056

7. Computation of Deficiency (or Damages) and Rebate Rights

Industrial Acceptance Corp. Ltd. V. Smith . 1057
Delta Acceptance Corp. v. Redman 1059
Note 1066

8. The Buyer's Right to Surplus

Chan v. C.C. Motor Sales Ltd. 1067

9. Forfeiture of Instalments

Stockloser v. Johnson, supra 891

Page No.

10. Conflict of Laws Problems

Note 1071

B. Relief for the Overcommitted Debtor

Extract, (1973) 36 M.L.R. 479 1072

Appendices

A. Transactional Materials

1. Retail Motor Vehicle Purchase Agreement 1078

Bank of Nova Scotia

2. Dealer Agreement 1081

3. Dealer Agreement Letter 1084

4. Application for Credit, Commercial 1087

5. Chattel Mortgage, Commercial 1088

6. Promissory Note, Commercial 1091

7. Application for Credit, Consumer 1092

8. Conditional Sale, Consumer, with Promissory Note 1094

9. Chattel Mortgage, Consumer 1098

Laurentide Finance

10. Industrial Conditional Sales Contract 1100

Beneficial Finance Co.

11. Chattel Mortgage for Loan of $1,500 or Less 1103

Page No.

12. Chattel Mortgage for Loan Over $1,500 1108

13. C.A.C. Leasing Co.: Leasing Agreement 1110

B. OLRC Report on Consumer Warranties

Summary of Recommendations 1112

PREFACE TO THE SIXTH (1976-77) EDITION

A much more comprehensive (though not exhaustive) revision has been attempted in the current edition of the casebook than was the case last year. Almost every chapter has been revised to some degree and the number of notes and comments has been greatly increased. The companion volume of statutory materials has been revised to match the changes in the casebook.

The tempo of judicial and legislative activity continues unabated. Easily the most important statutory development during the past year was the long delayed proclamation of the Ontario Personal Property Security Act. It confronted me with the difficult question whether to abandon in ch.11 most of the pre-PPSA cases on section 25 of the Sale of Goods Act and the material on secured seller's remedies in ch.15.

My decision was to retain them, at least in this edition. I did so on two grounds. The first was that the pre-PPSA cases have important pedagogical value and help to illustrate important policy issues. The second ground was that the PPSA does not supersede consumer protection legislation or common law principles affecting remedies in non-secured transactions such as equipment leases. A substantial number of the problems canvassed in ch.15 fall into these categories.

It will be obvious that my treatment of secured transactions is fairly rudimentary. It could hardly be otherwise in a four hour semester course (or its equivalent) which is designed to cover commercial and consumer sales, secured transactions, consumer credit and a small morsel of negotiable instruments law. The teacher who wants to flesh out the chattel security materials will find a much more complete collection in my separate casebook on Secured Transactions or he may wish to compile his own materials.

Without the devoted and intelligent labours of Francis Miniter, a recent graduate from the University of Toronto Law School, the revision could not have been completed on time. Mr. Miniter also played an important role in the researching and writing of the new or revised notes, and I am happy to acknowledge publicly my indebtedness for his assistance.

Mr. Stephen Whitzman, now an Osgoode Hall Law School graduate, again ably assumed responsibility for updating and editing the materials in the statutory volume. He too deserves my warm gratitude.

July 1976 J.S.Z.

TABLE OF ABBREVIATIONS

Treatises and Reports

ATIYAH	The Sale of Goods, 5th ed. (1975)
BENJAMIN	Benjamin's Sale of Goods, 1st ed., 1974 (A.G. Guest, ed.)
BOGERT, BRITTON & HAWKLAND	Cases and Materials on Sales and Security, 4th ed.
BOULTON	The Making of Business Contracts, 2nd ed. (1972)
CCH CANADIAN	Canadian Sales & Credit Law Guide (loose leaf, 2 vols.)
CCH (U.S.)	Instalment Credit Guide (loose leaf, 2 vols.)
CROWTHER	Report of the Committee on Consumer Credit (London, 1971)
FALCONBRIDGE	Banking & Bills of Exchange, 7th ed. (1969)
FRIDMAN	Sale of Goods in Canada (1973)
GOODE & ZIEGEL	Hire-Purchase and Conditional Sale: A Comparative Study (1965)
HONNOLD	Cases and Materials on Sales and Sales Financing, 3rd ed. (1968)
NEILSON	Consumer and the Law in Canada (1970)
OLRC Report	Ontario Law Reform Commission, Report on Consumer Warranties and Guarantees (August 1972)
SUTTON	The Law of Sale of Goods in Australia and New Zealand, 2nd ed. (1971)
ULA	Uniform Laws Annotated, 2nd ed. (1971) Uniform Commercial Code, Master Edition
WILLISTON	Williston on Sales (Revised ed., 4 vols.)
ZIEGEL & FOSTER	Aspects of Comparative Commercial Law (Montreal, 1969)

(N.B. The above volumes will be kept on reserve)

Statutes

A.B.D.A.	Assignment of Book Debts Act, R.S.O. 1970, c.33, as am.
B.P.A.	Business Practices Act, 1974 (Ont.).
B.o.E.	Bills of Exchange Act (Can.), as amended 1970.
B.o.S.	Bills of Sale & Chattel Mortgage Act, R.S.O. 1970 c.45, as am.
Bill 110	The Consumer Products Warranties Act, 1976 (Ont.).
C.I.A.	Combines Investigation Act, (Can.), as amended 1975.
C.P.A.	Consumer Protection Act, R.S.O. 1970, c.82 as am.
C.S.A.	Conditional Sales Act, R.S.O. 1970, as am.
Factors Act	R.S.O. 1970, c.156.
P.P.S.A.	Personal Property Security Act, R.S.O. 1970, c.344, as am.
S.G.A.	Sale of Goods Act, R.S.O. 1970, c.421.
U.C.C.	Uniform Commercial Code (1972 Official Text).
U.C.C.C.	Uniform Consumer Credit Code (U.S.).
U.P.P.S.A.	Model Uniform Personal Property Security Act (Can.).

SALE OF GOODS

Differences between U.K. Act and Ontario Act*

U.K.		Ontario	
Sec. 1	Definition of Sale	Sec. 2	
2	Capacity	Sec. 3	
3	Formation of Contract	Sec. 4	
4	"Stat. of Frauds Section" - has now been repealed	Sec. 5	$40 substituted for £10
5 - 21	. . . . .	Sec. 6 - 22	
22	Sales in Market Overt	Sec. 23	excludes English rule
23	Voidable title	Sec. 24	
24	Revesting of Property in stolen goods. .	OMITTED	
25	Seller or buyer in possession	Sec. 25	
26	Effect of Writs of Execution	OMITTED	
27 - 39	. . . . .	Sec. 26 - 37	
40	Attachment by Seller in Scotland	OMITTED	
41 - 58	. . . . .	Sec. 39 - 56	
59	Scottish law	OMITTED	
60	Repeals	OMITTED	
61(1)	Bankruptcy rules	OMITTED	
62	Definitions	Sec. 1	

---

* The references are to the original U.K. Act. Subsequent changes in the British Act, particularly those introduced by the Supply of Goods (Implied Terms) Act, 1973, are not included.